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NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE SUN PUBLISHING COMPANY, INC.,
petitioner,

versus

JAMES JONES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

WILLIAM L. POPE
P.O. Box 944
Columbia, SC 29202
(803) 779-8900
Counsel of Record for Petitioner

ROBERT McC. FIGG, JR.
P.O. Box 944
Columbia, SC 29202
(803) 779-8900
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Did the judgment rendered by the Supreme Court of South Carolina in this libel action impose liability without proof of fault upon Petitioner newspaper publisher in violation of its First and Fourteenth Amendment constitutional rights in respect to freedom of speech and of the press (1) by reversing the Trial Court's judgment *non obstante verdicto* in Petitioner's favor validly granted for lack of proof of fault on its part as a matter of law, and (2) by reinstating without review the flawed and invalid verdict which had been returned against it under erroneous jury instructions, duly excepted to, as to libel *per se* and presumed malice, thereby casting the burden of overcoming such presumption on Petitioner, and subjecting Petitioner to a finding of liability without proof of fault on its part?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Petitioner, The Sun Publishing Company, Inc.[1] respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the Supreme Court of the State of South Carolina entered in this proceeding on March 30, 1982.

OPINION BELOW

The Opinion of the Supreme Court of the State of South Carolina, Opinion No. 21680, filed March 30, 1982, is reported in .....S. C. ....., 292 S. E. 2d 23 (1982). Copy is attached as Appendix A. The Order of the Supreme Court of South Carolina filed May 31, 1982, which denied Petitioner's Petition for Rehearing is attached as Appendix B.

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[1] The Petitioner, The Sun Publishing Company, Inc. is a wholly owned subsidiary of The State-Record Company, a Delaware Corporation. Other wholly owned subsidiaries of The State-Record Company, Inc., are Columbia Newspapers, Inc.; The State Printing Company, Inc.; Gulf Publishing Company, Inc.; State Telecasting Company, Inc. (S.C.); State Telecasting Company (Delaware); Newberry Publishing Company and; Band & White, Inc.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). The judgment of the Supreme Court of the State of South Carolina, dated March 30, 1982, violates the rights of Petitioner granted by the First and Fourteenth Amendments to the Constitution of the United States in respect to freedom of speech and of the press. Petitioner's petition for rehearing was denied by Order dated and entered May 31, 1982. This petition for a writ of certiorari was filed within ninety (90) days of that date.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment I:

"Congress shall make no law . . . abridging the freedom of speech or of the press . . . "

Amendment XIV:

" . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

This action in libel was instituted by Respondent on May 4, 1976, seeking to recover $1,000,000.00 damages, actual and punitive, by reason of a news article which appeared in the January 27, 1976, issue of The Sun News, a daily newspaper published by Petitioner in Myrtle Beach, South Carolina. (R. 1-4)

In the summer of 1975 the FBI conducted an investigation along the east coast into pirated tapes of copyrighted music. In June, 1975, more than 35,000 tapes suspected of being "pirated" were confiscated at Myrtle Beach, South Carolina, together with equipment suspected of being used to produce illegal tapes from legal, copyrighted tapes. The seizure was reported in the June 20, 1975, issue of The

Sun News, a daily newspaper published by Petitioner in Myrtle Beach, without the mention of names. (R. 122)

On November 21, 1975, The Sun News reported the arraignment of five Myrtle Beach men and a Charlotte, North Carolina, man on an information which charged that they "aided and abetted each other in connection with the wilful infringement of copyrighted eight-track tapes," according to the U. S. Attorney's office in Columbia. Assistant U. S. Attorney Reynolds Williams was quoted as saying that Herman Jones, Jack Jones, James Jones, Michael E. Schitano, and Randall Small, all of Myrtle Beach, and Buck Baker, of Charlotte, North Carolina, pleaded innocent to the seven-count information. (R. 124)

On Tuesday, January 27, 1976, an article in The Sun News stated that on the previous day Herman Calvin Jones, James Jones, Randall Small, and Michael E. Sichitano pleaded guilty in the Federal Court at Florence and were fined on misdemeanor charges arising from the violation of a copyright on a stereo recording, according to the U. S. Attorney's Office in Columbia. (R. 116) This statement was attributed to the United States Attorney but was actually made by Assistant U.S. Attorney Reynolds Williams to Petitioner's reporter John Monk on a long distance call to Williams in Columbia. (R. 50, 75)

This article, which is the one in question, was written by Petitioner's reporter John Monk based upon information obtained by him from the United States Attorney's office by means of a long distance telephone call from Myrtle Beach to Columbia, South Carolina, a distance of approximately 141 miles. (R. 47-52; 48)

It was not until the service of the suit papers in the instant action that Petitioner and reporter Monk learned that there had been a mistake in the information on the basis of which the article of January 27, 1976, had been written. (R. 39)

In the article the list of those reported as having pleaded guilty included the name of Respondent, James Jones, instead of that of his co-defendant uncle, Jack Jones, who, with co-defendant Herman Jones, Respondent's father, pleaded guilty and was fined. The charges against Respondent had been dismissed several days earlier by the United States Attorney as a part of his plea bargaining with co-defendants Herman and Jack Jones. (R. 72)

Petitioner's Answer admitted the publication of the article in question; alleged that it was published without malice and from information obtained through official channels concerning a matter of public interest; and that it was privileged under the provisions of the First Amendment to the Constitution of the United States and similar provisions in the South Carolina Constitution.

The action was tried during the February, 1979 term of Court before Circuit Judge Wade S. Weatherford and a jury. (R. 1) The plaintiff's case consisted solely of his testimony identifying the news article complained of and the United States Attorney's dismissal of the charges against him (R. 12, 9), and stating that he was embarrassed and upset by the article. (R. 13, 14) He stated that he was employed by his father as manager of a motel, and there was no evidence of any pecuniary damage or actual loss. (R. 8)

Petitioner's motion for a nonsuit contended, first, that Respondent had failed to prove, by clear and convincing evidence, that the newspaper had any knowledge that the article printed was false or that it acted in reckless disregard whether it was false or not; secondly, that there was no proof of any degree of fault on Petitioner's part, "no evidence that the newspaper was, in any way, at fault in printing the article or portion of the article that is complained of;" and thirdly, that there is no proof or offer of proof of malice on the part of Petitioner. (R. 15)

The motion was overruled (R. 24) and reporter Monk and Assistant United States Attorney Williams were called as witnesses by Petitioner.

Monk testified to the long distance conversation with Williams at the U. S. Attorney's office in Columbia. (R. 31, 33, 34) He said this was the customary procedure for obtaining news stories about criminal proceedings in the Federal Court. (R. 32) Williams also testified to the long distance conversation, and he said that in virtually every out of town case of any importance he would get such calls from out of town reporters. (R. 70, 71) Both Monk and Williams stated that the long distance conversation occurred on the day before the article of January 27, 1976, appeared. (R. 48, 89)

Monk identified the notes, made by him during the conversation with Williams (Defendant's Exhibit 4). (R. 35) He testified unequivocally that, as shown by his notes, the name of James Jones was among the list of names which Williams gave him. (R. 125, 35, 36)

Williams in his testimony did not take issue with what Monk testified to. (R. 76) He stated, in substance, that while he had read the names and the amounts of the fines from the file he did not have a specific recollection of what he said; (R. 76) that in previous dealings with this file he had confused in his mind the various Joneses in this case; (R. 77) and when asked specifically on cross-examination whether he "at any time, read the name, James Jones, as having pled guilty to this indictment," he replied, "I do not know." (R. 81) He said he could have made a mistake, and did not know whether he did or not. (R. 89)

Petitioner's motion for a directed verdict, which again challenged the sufficiency of the evidence as matter of law to take the issue of fault on its part to the jury, was overruled. (90, 91, 107, 108)

In his charge to the jury the Trial Judge eliminated the issue of punitive damages, stating that the proof in the case did not establish any actual or expressed malice. However, he instructed the jury that the "publication of false written words which charge another with the commission of a crime is said to be a libel, *per se*, meaning of itself;" that "any expression which is libelous, *per se*, presumes or implies the presence of malice;" and that "the law itself considers that this wrongful act carries with it an implication of intent and an implication of an absence of justification." He charged further that "the presumption of malice is a rebuttable presumption," and that "if the implied malice, having once been established, is not rebutted, or answered or overcome, then that is sufficient proof by the plaintiff to meet his burden or proof," and he "is entitled to rely upon the implied malice in meeting the burden of proving one of the essentials of his claim." (R. 133-135)

Petitioner's counsel duly excepted to this portion of the charge to the jury as being erroneous "under the *Gertz* case." (R. 141, 142, 140)

The jury returned a verdict for Respondent in the amount of $35,000.00 actual damages. (R. 113)

Petitioner made a motion for judgment *non obstante veredicto* on the ground that the evidence as a matter of law failed to show that the publication was made by the defendant with actual malice or fault in fact, and that liability under the First and Fourteenth Amendments cannot be predicated upon presumption of malice based upon the content of the article published. (R. 144-145)

Petitioner in the alternative moved for a new trail because the Court erred in charging the jury in connection with libel *per se*, and presumed or implied malice, and the burden of proof on the issue of malice, and that the charge permitted the jury to find a verdict against Petitioner "even

if it were not in fact at fault in connection with the publication of the alleged libelous statement." (R. 146, 147)

In his order dated August 20, 1979 (Appendix C) (R. 148-155), Judge Weatherford granted Petitioner's motion for judgment *non obstante veredicto* on the ground that the showing made failed to warrant or support a reasonable inference of simple negligence on the part of the publisher or the reporter. He wrote: "A directed verdict should have been granted on the question of liability. This makes it unnecessary to discuss the motion for a new trial." (R. 154)

Petitioner filed exceptions to the failure to consider the alternative motion for a new trial. (Appendix D) (R. 157-158)

On March 30, 1982, Judge Weatherford's Order was reversed in a majority opinion of three Justices of the Supreme Court of South Carolina, written by Justice Harwell. Chief Justice Lewis and Justice Littlejohn each dissented. (Appendix A)

The majority opinion held that "a jury question was presented as to whom (sic) was at fault in publishing the erroneous article," and that Judge Weatherford "was in error in substituting his view of the facts for those found by the jury." The majority opinion concluded: "We reverse and reinstate the verdict."

In reinstating the verdict the majority of the Court did not note or pay any attention to the fact that the record on the appeal showed that the validity of the verdict was challenged by Petitioner, and was flawed and invalid. It was returned by the jury pursuant to instructions, duly excepted to, as to libel *per se*, presumption of malice, and burden of proof, which authorized and permitted a verdict without finding Petitioner at fault, and placed the burden of proof on the issue of fault upon Petitioner instead of on Respondent as plaintiff. (R. 146, 147)

Petition for rehearing was denied by order dated May 31, 1982, with Chief Justice Lewis and Justice Littlejohn again dissenting. (Appendix B)

Petitioner repectfully submits that liability was imposed upon it by the Supreme Court of South Carolina without proof of fault on its part, by reversing the judgment *non obstante veredicto* in its favor, and also by reinstating the verdict which had been returned under instructions permitting the jury to find liability without finding fault on its part.

Federal Question Was Raised and Preserved

The Federal Question sought to be reviewed was first raised in Petitioner's Answer (R. 5) and thereafter raised and preserved at each subsequent opportunity: in its motion for nonsuit at the close of Respondent's evidence (R. 15-24); in its motion for directed verdict (R. 90, 105); in its exceptions to the Trial Judge's charge to the jury (R. 141-143); in its motion for judgment *non obstante veredicto* after the return of the verdict against it (R. 144-145); in its motion for a new trial in the alternative (R. 146-147); in its Exceptions, on Respondent's appeal to the Supreme Court of South Carolina, to the Trial Judge's failure to pass upon and grant Petitioner's motion for a new trial in the alternative (R. 157); and in its Petition for a Rehearing in the Supreme Court of South Carolina (Appendix E).

REASONS FOR THE WRIT

I

The Judgment of the Supreme Court of South Carolina in this libel action imposed liability without proof of fault upon Petitioner newspaper publisher in violation of its First and Fourteenth Amendment rights

by reversing the Trial Court's Judgment non obstante veredicto in Petitioner's favor validly granted for lack of proof of fault on its part as a matter of law.

(1)

Under the First Amendment, liability in a defamation action by a private individual cannot constitutionally be imposed upon a publisher or broadcaster in the absence of proof of fault by the plaintiff.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 248 (1974), the Court recognized that the First Amendment "shields the press and broadcast media from the rigors of strict liability for defamation" in actions brought by private individuals.

In the *Gertz* decision the Court announced "constitutional limitations" on the power of the States to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

"These are a prohibition against imposing liability without fault, 418 U.S., at 347, and the requirement that compensatory awards 'be supported by competent evidence concerning the injury.' *Id.*, at 350." *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976).

(2)

From a reading of the majority opinion in the instant case, it would appear that the Supreme Court of South Carolina has adopted common law negligence in the publication of a defamatory statement as the standard of liability which a private individual must prove under the First Amendment in order to recover actual damages from the publisher or broadcaster. Under The United States Constitution, however, the question whether evidence is legally sufficient to warrant submission of the issue of

Petitioner's alleged negligence or other fault to the jury is a Federal question, not of fact, but of law.

An essentially similar Federal question was presented in petitions for writs of certiorari filed by railroad defendants seeking review of judgments rendered against them in state courts under the Federal Employers Liability Act which imposed liability upon proof of negligence on their part for injuries sustained by their employees in interstate commerce.

The controlling principle in such cases was stated in *Atlantic Coast Line Railroad Co. v. Driggers*, 279 U.S. 787, 788 (1929), to be that:

> [I]f it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the railroad company was the cause of death, the judgment must be reversed.

The Court said in *Brady v. Southern Railway Co.*, 320 U.S. 476, 479 (1943):

> The weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of the facts—in this case, the jury. (citing cases) When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict. The court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

The Court said in *Gunning v. Cooley*, 281 U.S. 90, 94:

> A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Schuylkill & D. Improv. & R. Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867, 872; *Pleasants v. Fant*, 22 Wall. 116, 122, 22 L. Ed. 780, 783.

cf. Creswill v. Grand Lodge, K of P., 225 U.S. 246 (1912); *Union P. Railroad Co. v. Huxoll*, 245 U.S. 535 (1918).

(3)

It is respectfully submitted that the Supreme Court of South Carolina has permitted the imposition of liability on the Petitioner newspaper publisher by a verdict based on speculation without proof of negligence or fault of any kind.

(a)

The critical factual issue in the case was whether Assistant United States Attorney Williams made a mistake in the list of names that he gave to reporter Monk over the telephone or whether reporter Monk made the mistake of inserting the name of Respondent in such list in his notebook.

The list published was that which Monk had written in his reporter's notebook during the telephone conversation. Monk's clear and positive testimony was that these were the names given to him. Williams impliedly attested to

Monk's care in making the notes by his statement that he knew Monk was taking notes because Monk would confirm spellings with him and would repeat things he had said.

Williams did not controvert in his testimony the testimony of Monk. Instead he stated that his recollection was not specific enough that he could deny what Monk had said. Although Williams said he read the names and the amounts of the fines from the file, he again testified that he had no specific recollection of what he had said. He admitted that in his previous dealings with this file he had confused in his own mind the various Joneses in this case. When asked on cross-examination whether, at any time, he had "read the name James Jones as having pled guilty to this indictment," he replied "I do not know." His final testimony was that he could have made a mistake in his conversation with Monk, and that he did not know whether he did nor not.

Chief Justice Lewis after setting out what he termed the "critical testimony" of Williams, stated in his dissenting opinion:

> *The witness says he does not know what he said.* If he testified truthfully, the jury could only conclude that he did not remember. His actual words would remain a matter of pure speculation. If his testimony was not true, and he was merely feigning forgetfulness, the jury would still have no basis for any finding as to Williams' actual statement to Monk. *Even in the exercise of reasonable conjecture, as the majority would have the jury do, the only reasonable conclusion is that it was Williams not Monk who made the mistake,* given his admission that he had confused the Joneses before.
>
> The majority insists, however, that this testimony (which stands utterly alone) requires submission of

the case to the jury and sustains a verdict upon the premise that Monk improperly recorded the names. *The testimony evidences nothing of the kind; in fact, it is evidence of nothing at all.*

Certainly, the testimony of Williams, that he did not remember what he told Monk, would have no probative value in establishing what he did tell Monk. Likewise, it could have no probative value in refuting the statement of Monk as to what Williams did say. (Emphasis added)

Chief Justice Lewis wrote further that although South Carolina adheres to the "scintilla of evidence" rule, "this is the first time in my experience in which the Court has erected a jury issue upon testimony from which no material inference can be drawn."

The majority's reasoning on this issue was as follows:

Although the attorney testified that he had confused the various Joneses in his own mind on a previous unrelated occasion, he stated the records were in front of him when he spoke to the reporter on the telephone. Moreover, he testified that he did not have a 'specific recollection' of what he said to the reporter.

It is undisputed appellant's name did not appear on the public record as having pled guilty. Since the U. S. Attorney could not recall what he conveyed to Monk, the defendant's reporter, over the telephone, but testified that he read the names directly from the record, a jury issue was created as to whether the U. S. Attorney erred in reading the names to Monk or whether the reporter erred in writing them down. The testimony supports the jury's apparent finding that Williams, the U. S. Attorney, read the correct names to Monk but that Monk erred in writing them down.

Petitioner submits that the foregoing statement fully justified Chief Justice Lewis' characterization of it, that "the Court has erected a jury issue upon testimony from which no material inference can be drawn."

To the extent that the word "directly" may have had importance in the majority's conclusion, it should be noted that it was a word not used by Williams in his testimony. The majority overlooks entirely the significant circumstance that Williams was reading the names from five names while Monk was writing from none except those given him over the telephone. And the majority's stated conclusion gives effect to supposed speculation by the jury on what Williams did and said despite the fact that Williams, a participant in the action involved, would not himself speculate on it under oath.

When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to support neither. *Gunning v. Cooley, supra,* at 94 of 281 U.S.

The record leaves the matter of what Williams may have done and said in the realm of speculation and doubt at best, and that is not enough. *Chicago, M. & St. P. R. Co. v. Coogan,* 271 U.S. 472, 478 (1926).

The testimony given by Monk stands uncontradicted; it is corroborated beyond question by the notebook entry, which is physical evidence of a contemporary and compelling nature; no reason appears in the record to doubt that the list published was in fact the list which Monk was given over the telephone; and the holding in the majority opinion that a jury issue was created as to whether the mistake may have been Monk's is completely without foundation in the record.

The majority opinion sought to shore up its reversal of the Trial Court's judgment by the following speculative reasoning:

> Moreover, the jury could have inferred that Monk departed from acceptable standards of reporting when he failed to check the public record himself, rather than relying on information supplied over the telephone. Williams testified the records were open to the public and that Monk could have read them himself. Additionally, the six day hiatus between the guilty pleas and the publication of the defamatory article negates any rush by respondent to print 'hot news.' The jury could have reasonably concluded that Monk's failure to make an independent investigation, either by checking the public records himself or contacting the Joneses, with whom he was acquainted, was negligence.

The majority's statement about a "six day hiatus" was an unfortunate one, for the record clearly shows that the guilty pleas were entered on January 26th and the article appeared in the January 27th issue of The Sun News

Respondent offered no evidence to show what the majority opinion called "acceptable standards of reporting." Petitioner's evidence showed that Monk was an experienced reporter and that the Assistant United States Attorney was the usual spokesman for the United States Attorney's office. The evidence in the record bearing upon reporting procedures or standards came from Monk and Williams. The testimony of both showed that Monk's telephone inquiry of the United States Attorney's office was in keeping with the customary procedure by which out of town newspapers and their reporters obtained information about criminal proceedings in the Federal Courts. There was no evidence to the contrary.

The majority holding speculated that the jury "could have" found negligent departure from "acceptable standards of reporting" with no basis for such finding except their lay and uninformed inferences about a professional

matter. In Restatement (Second) of Torts, § 580B, Comment g, 227-228 (1976) it is suggested, in substance, that such a finding would unavoidably amount to a finding that the defendant must have been negligent because the publication was false, and thus would constitute a form of strict liability *de facto* circumventing the constitutional requirement of proof of fault.

On this issue the Trial Judge's holding which the majority opinion reversed was as follows:

> There is no evidence in the record that the reporter acted in any way other than as a reasonably prudent reporter would have acted under similar circumstances. The information for the story was obtained from a public official in the course of his official duties. The source had proved reliable in the past and there was no reason to doubt the accuracy of the information released by him on this occasion. The information relating to this criminal proceeding was sought and obtained in the same manner that had been routinely utilized by this reporter and other members of the news media in general practice.

Petitioner submits that the Trial Judge's holding was warranted and supported by the record, and that the judgment reversing it and substituting a speculative possible finding of fact on Petitioner's part contravened its constitutional rights.

(c)

It is respectfully submitted that the judgment *non obstante veredicto* granted by the Trial Judge because a verdict should have been directed for lack of proof of fault was warranted and required by the evidence as a matter of law, and that the judgment of the Supreme Court of South Carolina erroneously reversing the judg-

ment of the Trial Court imposed liability without fault upon Petitioner in violation of its constitutional rights.

II

The judgment of the Supreme Court of South Carolina in this libel action imposed liability without proof of fault upon Petitioner newspaper publisher in violation of its First and Fourteenth Amendment rights by reinstating the flawed and invalid verdict which had been returned against it under erroneous jury instructions, duly excepted to, as to libel per se and presumed malice which cast the burden of overcoming such presumption on Petitioner and permitted the finding of liability without proof of fault on its part.

The Trial Judge instructed the jury as follows:

> The publication of false written words which charge another with the commission of a crime is said to be a libel, *per se*, presumes or implies the presence of malice. . . . Now, ladies and gentlemen, the presumption of malice is a rebuttable presumption and so if you find, from the proof in the case, at one point you say malice is present, implied malice has been established. Then you must consider whether or not it has been answered and overcome. . . . But now if the implied malice, having once been established, is not rebutted or answered or overcome, then that is sufficient proof by the plaintiff to meet his burden of proof. In other words, he is entitled to rely upon the implied malice in meeting the burden of proving one of the essentials of his claim.

These instructions were duly excepted to "under the *Gertz* case" by counsel for Petitioner at the conclusion of the charge but were adhered to by the Trial Judge. The verdict reinstated by the Supreme Court of South Carolina

in the majority opinion was returned by the trial jury under these erroneous instructions.

After the return of the verdict, counsel for Petitioner moved for judgment *non obstante veredicto* in its favor, and also for a new trial in the alternative upon grounds, among others, that the foregoing instructions were erroneous under the First and Fourteenth Amendments.

The Trial Judge granted judgment *non obstante veredicto* in Petitioner's favor, but did not discuss or pass upon the alternative motion for a new trial. Petitioner, in accordance with South Carolina practice, filed in Respondent's appeal record exceptions to this failure of the Trial Judge to pass upon the alternative motion, thereby preserving its challenge to the verdict based upon the strict liability charged to the jury under which the verdict was returned.

The majority opinion reinstated the verdict without passing upon Petitioner's exception to the Trial Judge's failure to grant a new trial in the alternative, and consequently without remanding the case for consideration by the Trial Court of Petitioner's duly preserved challenge to the instructions under which the verdict was returned.

Since the Trial Court's instruction authorized the jury to return a verdict upon the basis of the presumption of malice contained in the instructions, and did not require the jury to find any fault in fact on the part of Petitioner or its reporter, it is respectfully submitted that the instructions were erroneous under *Gertz v. Welch, supra*, and that the verdict returned against Petitioner was thereby flawed and invalid, and should have been set aside. To the judgment of the Supreme Court of South Carolina his reinstating such verdict imposed liability upon Petitioner without proof or finding of fault upon its part, and thereby violated its rights under the First and Fourteenth Amendments.

CONCLUSION

It is respectfully submitted that the question presented for review is meritorious; that such question is of general importance in the Federal Constitutional law applying to libel actions brought against publishers and broadcasters by private individuals, as well as to Petitioner and others engaged in carrying on news media business in South Carolina; and that due consideration of the proof in this case under the legal principles applicable under the First Amendment will warrant the reversal of the challenged judgment.

For the reasons hereinabove set forth, it is respectfully prayed that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM L. POPE
P. O. Box 944
Columbia, SC 29202
Counsel of Record for Petitioner

ROBERT McC. FIGG, JR.
P. O. Box 944
Columbia, SC 29202
Counsel for Petitioner

Appendix A

THE STATE OF SOUTH CAROLINA

In The Supreme Court

James Jones, ... Appellant,

v.

The Sun Publishing Company, Inc., ...Respondent.

Appeal From Horry County

Wade S. Weatherford, Jr., Judge

Opinion No. 21680

Filed March 30, 1982

REVERSED

Stevens, Stevens & Thomas, of Myrtle Beach, for appellant.
McCutcheon & McCutcheon, of Conway; and Robinson, McFadden, Moore & Pope, of Columbia, for respondent.

HARWELL, A. J.: Appellant initiated this suit for libel because respondent published an article which erroneously reported that appellant had pled guilty to charges of copyright infringement. A verdict of $35,000 actual damages was returned by the jury in favor of appellant. Concluding that the evidence failed to establish the respondent's negligence, the trial judge granted the respondent a judgment *non obstante veredicto*. Appellant alleges it was for the jury to determine whether the publication of the false and

defamatory matter was occasioned by any legal fault by the publisher. We agree.

In November 1975, appellant and his father and uncle along with two other individuals were arrested and arraigned on charges of "pirating" stereo tapes in violation of the copyright laws. (Appellant, his father, and his uncle all had the surname Jones.) Respondent reported these events in an article published on November 21, 1975. Two months later, appellant's father and uncle entered guilty pleas as part of a plea bargain which resulted in dismissal of the charges against appellant.

Respondent's reporter telephoned the U. S. Attorney's office and spoke with the attorney who later prosecuted the case against appellant's father and uncle. The respondent then erroneously reported that appellant was among those who had pled guilty. The respondent contended that its reporter garnered the erroneous information from the U. S. Attorney and printed the article in reliance upon the misinformation. However, there was testimony from which the jury may have fairly determined that the information was correctly conveyed to the reporter but erroneously reported by him.

Under settled principles, this Court's scope of review in a case of this nature is limited. In a law case, tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. Townes Associates, Ltd. v. City of Greenville, 266 S. C. 81, 221 S. E. 2d 773 (1976). Moreover, in reviewing the propriety of an order granting judgment N. O. V., we are bound to review the evidence and all reasonable inferences therefrom in the light most favorable to the party opposing the motion. See cases collected in 3 S. C. Digest, *Appeal & Error*, Key No. 934(1).

Although the attorney testified that he had confused the various Joneses in his own mind on a previous unrelated occasion, he stated the records were in front of him when he spoke to the reporter on the telephone. Moreover, he testified he did not have a "specific recollection" of what he said to the reporter.

It is undisputed appellant's name did not appear on the public record as having pled guilty. Since the U. S. Attorney could not recall what he conveyed to Monk, the defendant's reporter, over the telephone, but testified that he read the names directly from the record, a jury issue was created as to whether the U. S. Attorney erred in reading the names to Monk or whether the reporter erred in writing them down. The testimony supports the jury's apparent finding that Williams, the U. S. Attorney, read the correct names to Monk but that Monk erred in writing them down.

Moreover, the jury could have also inferred that Monk departed from acceptable standards of reporting when he failed to check the public record himself, rather than relying on information supplied over the telephone. Williams testified the records were open to the public and that Monk could have read from them himself. Additionally, the six day hiatus between the guilty pleas and the publication of the defamatory article negates any rush by respondent to print "hot news". The jury could have reasonably concluded that Monk's failure to make an independent investigation, either by checking the public records himself or contacting the Joneses, with whom he was acquainted, was negligence.

Here, there was no claim or proof that appellant Jones was either a public official or a public figure; hence, under the reasoning of Gertz v. Robert Welch, Inc., 718 U. S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), appellant was required only to establish some measure of legal fault

by the publisher in order to warrant submission of the matter to the jury. The critical language in *Gertz* is as follows:

> "We hold that so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U. S. at 346, 94 S. Ct. at 3010.

The *Gertz* Court rationally differentiated between the standard to be applied to public officials and public figures on the one hand, and private individuals on the other. The former, due to their significantly greater access to the communication network, have an infinitely greater ability and opportunity to counteract false statements than do private individuals. Commenting on the private individual's right to recover upon a less stringent standard than that imposed on public officials and public figures, the Court stated:

> "He (the private individual) has not accepted public office or assumed an 'influential role in ordering society' . . . He has relinquished no part of his interest in the protection of his own good name, consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. *Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.*" (Emphasis supplied). 418 U. S. at 345, 94 S. Ct. at 3010.

This Court has never before extended a qualified privilege to a publisher who inaccurately reports the contents of judicial proceedings. See Lybrand v. The State Co., 179 S. C. 208, 184 S. E. 580 (1936); McClain v. Multimedia, Inc., 275 S. C. 282, 270 S. E. 2d 124 (1980). As

stated by Prosser, Handbook of the Law of Torts, p. 832 (4th Ed. 1971):

> "[I]t has always been held that the report must be a fair and accurate one, and the privilege does not cover false statements of facts as to what has occurred, *or mistakes in the names of parties,* or the interpolation of defamatory matter, or a one-sided account." (Emphasis supplied).

In Lybrand and McClain, supra, there was no assertion the article in question was not a fair and impartial report of pleadings filed with the court and malice was thus required to defeat the privilege. We recognized, however, the United States Supreme Court holding in Time, Inc. v. Firestone, 424 U. S. 407, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), that liability may attach where a publisher fails to accurately reproduce the contents of public records. McClain, supra, note 2.

The United States Supreme Court in Firestone, supra, soundly rejected the precise argument which the trial judge accepted here. In Firestone, Time Magazine reported on the domestic litigation between an industrial magnate and his estranged wife. Mary Alice Firestone sued her husband for separate maintenance and her husband counterclaimed for divorce on the grounds of extreme cruelty and adultery. The Florida divorce court granted the counterclaim and the divorce, though it did not find that Mrs. Firestone was guilty of either extreme cruelty or adultery. Time reported the divorce was granted on the grounds of extreme cruelty and adultery. Mrs. Firestone was awarded a jury verdict in her subsequent defamation action.

Although the Supreme Court reversed and remanded because the issue of fault had not been submitted to the jury as required by *Gertz,* it rejected arguments by Time

that the New York Times privilege be extended to all reports of judicial proceedings. The Court stated:

> "Petitioner would have us extend the reasoning of *Cox Broadcasting* to safeguard even inaccurate and false statements, at least where 'actual malice' has not been established. But its argument proves too much. It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from labeling all judicial proceedings matters of 'public or general interest,' as that phrase was used by the plurality in *Rosenbloom*. Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interest in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff." 424 U. S. at 456, 96 S. Ct. at 966.

The record here does not support the trial court's conclusion that a public official supplied false information to respondent's reporter. Instead, a jury question was presented as to whom was at fault in publishing the erroneous article. The trial judge was in error in substituting his view of the facts for those found by the jury. We reverse and reinstate the jury verdict.

Reversed.

NESS and GREGORY, JJ., concur. LEWIS, C. J., and LITTLEJOHN, A. J., dissent.

LEWIS, C.J. (dissenting): The majority opinion reverses the judgment *non obstante veredicto* entered by the trial

court. It does so by: (1) discovering a jury issue which I am unable to find in this record; and (2) announcing a principle of law for which I know of no authority. I must, therefore, dissent.

The majority finds a jury question in the testimony concerning a long-distance telephone conversation between Monk, reporter for the respondent newspaper, and Williams, the Assistant United States Attorney. What occurred during this conversation is indeed crucial to the outcome of this case, for somehow during the call the plaintiff's name became identified as one of the Joneses who was pleading guilty to federal charges. Either Williams made a mistake in reciting the names to Monk or Monk made a mistake in taking the names from Williams.

The testimony of Monk is unequivocal. He states that he was given the name "James Jones" (plaintiff) not "Jack Jones" (plaintiff's uncle) and that he wrote his article accordingly. Monk's notes, preserved and introduced as evidence, clearly show "James Jones" and not "Jack Jones."

The critical testimony of Williams should be set out here for examination:

Q. (by the Court): Alright, he's asking you, sir, if you stated to [Monk] the name of James Jones or what did you say, if you have a recollection?

A. I do not have a specific recollection of what I said.

• • •

Q. Did you, at any time, read the name, James Jones, as having pled guilty to this indictment?

A. I do not know.

Q. You don't know that, sir, and you read from the record?

A. I presume . . . .

Q. You don't know right on?

A. That's right.

• • •

Q. If I understand what you told me, you read from the record, public record, is that right, sir, to Mr. Monk?

A. I did. There's no saying that I did not make a mistake in so reading them.

Q. . . . I'm asking you if you made a mistake. So far as you know, you told him what was on the records?

A. So far as I know, I told him what was on the record and that was my intent.

• • •

Q. Could you have made a mistake in your conversation with Mr. Monk?

A. Yes, sir.

Q. Did you make a mistake, sir?

A. I don't know.

• • •

The witness says he does not know what he said. If he testified truthfully, the jury could only conclude that he did not remember. His actual words would remain a matter of pure speculation. If his testimony was not true, and he was merely feigning forgetfulness, the jury would still have no basis for any finding as to Williams' actual statement to Monk. Even in the exercise of reasonable conjecture, as the majority would have the jury do, the only reasonable conclusion is that it was Williams not Monk who made the mistake, given his admission that he had confused the Joneses before.

The majority insists, however, that this testimony (which stands utterly alone) requires submission of the case to the jury and sustains a verdict upon the premise that Monk improperly recorded the names. The testimony evidences nothing of the kind; in fact, it is evidence of nothing at all.

Certainly, the testimony of Williams, that he did not remember what he told Monk, would have no probative value in establishing what he did tell Monk. Likewise, it

could have no probative value in refuting the statement of Monk as to what Williams did say.

South Carolina adheres to the "scintilla of evidence" rule which requires submission of an issue to a jury whenever there is competent and relevant evidence tending to establish the issue in the mind of a reasonable juror. The rule does not authorize submission of speculative, theoretical or hypothetical views nor does it permit a verdict to stand upon surmise, conjecture or speculation. *Turner v. American Motorists Ins. Co.*, 176 S. C. 260, 262-263, 180 S. E. 55; *McMillan v. Southern Ry. Co.*, 196 S. C. 373, 376, 13 S. E. 2d 915; *Young v. Hyman Motors, Inc.*, 199 S. C. 233, 242-243, 19 S. E. 2d 109; *In re Crawford*, 205 S. C. 72, 91-92, 30 S. E. 2d 841; *Johnson v. Metropolitan Life Ins. Co.*, 206 S. C. 415, 419-420, 34 S. E. 2d 757; *Bell v. Bank of Abbeville*, 211 S. C. 167, 173, 44 S. E. 2d 328; *Marks v. Industrial Life and Health Ins. Co.*, 212 S. C. 502, 505-506, 48 S. E. 2d 445; *Fagan v. Timmons*, 215 S. C. 116, 121, 54 S. E. 2d 536; *Tallon v. Seaboard Coast Line Railroad Co.*, 270 S. C. 362, 365, 242 S. E. 2d 418; *Bradburn v. Colonial Stores, Inc.*, 273 S. C. 186, 255 S. E. 2d 453; *Taylor v. Bryant*, 274 S. C. 509, 265 S. E. 2d 514; *Bultman v. Barber*, ____ S. C. ____, 281 S. E. 2d 791; *Whisenant v. James Island Corporation*, ____ S. C. ____, 281 S. E. 2d 794.

Under these prior cases, and others, our Court has deemed evidence relevant and/or competent according to its tendency to establish material issues between the parties. We have even, as these decisions show, permitted circumstantial evidence to outweigh opposing direct evidence, but this is the first case in my experience in which the Court has erected a jury issue upon testimony from which no material inference can be drawn. The precedent here established is a decidedly dangerous one.

Equally disturbing is the apparent adoption by the majority of a principle of law for which I can find no authority. The trial judge concluded that the defendant had no duty of further inquiry after receiving information from a reliable public official in a routine manner and in the conduct of his official duties. Justice Littlejohn has quoted the relevant language of the trial court in his separate dissent herein. To his opinion I would simply add some observations drawn from other jurisdictions. The facts of this case are new to South Carolina, but they have arisen elsewhere with courts uniformly reaching the opposite result from that which our Court announces today.

Official sources are indispensable if the public is to be informed, yet official sources do make mistakes. My search reveals cases where authorities have released startling information to the press resulting in widespread publication. There have been cases of unexplained misidentification, including release of an innocent person's photograph as a criminal suspect, and even an instance of false identification given by the suspect himself and passed on through the press to the public. *See Karp v. Miami Herald Publishing Co.*, 359 So. 2d 580; *LeBoeuf v. Times Picayune Publishing Corp.*, 327 So. 2d 430; *Wilson v. Capital City Press*, 315 So. 2d 393; *Mathis v. Philadelphia Newspapers*, 455 F. Supp. 406; *Moloney v. Tribune Publishing Company*, 613 P. 2d 1179.

In these decisions courts have paid special attention to the following factors: (1) the official source had direct access to the public record or judicial proceeding; (2) the official source was either directly responsible for the investigation or prosecution or was an authorized representative of those responsible; (3) the defendant publishers had previously relied upon the same official source; (4) the defendant publishers had no reason to question the information supplied by the official source; (5) conditions

would not permit the defendant publishers to independently verify the information so supplied. In each of the cases just cited at least two of the five circumstances were present, with the result that the defendant publishers were held to be without fault.

This approach strikes what I consider a proper balance between the need to protect private individuals from publication of injurious falsehoods and the need to guarantee vigorous and uninhibited exercise of First Amendment freedoms. The effect of these cases is to create a qualified privilege protecting publishers of defamatory errors or falsehoods when publication is in reliance upon the mistake of an official source. In South Carolina, such a qualified privilege would constitute an affirmative defense to be raised on the pleadings and proved. *Rutledge v. Junior Order of United American Mechanics*, 185 S. C. 142, 149-150, 193 S. E. 434; *Moore v. New South Express Lines*, 184 S. C. 266, 269, 192 S. E. 261; *Kirby v. Gulf Refining Co.*, 173 S. C. 224, 228-229, 175 S. E. 535.

The majority has, however, chosen a different path. It is clear from its decision that the majority will impose liability upon a newspaper reporter or publisher upon a theory of negligence whenever such a defendant relies upon an official source who turns out to be mistaken. In the present case the newspaper received information from an Assistant United States Attorney who had access to the public record, who gave every indication he was reading from the public record, who had primary responsibility for the prosecution of the case, and who had earlier supplied reliable information in the matter. Moreover, the testimony shows that the reporter had no reason to doubt the information being supplied nor would it have been practical for him in Myrtle Beach to verify the official records in Florence or Columbia, seventy and one hundred forty-one miles away respectively. I am satisfied that this

publication, though unfortunately false, and possibly injurious to the appellant, should be accorded a qualified privilege and not made a basis for liability.

In keeping with my view that this should be an occasion of privilege, I have reviewed the record with an eye to our rule that a qualified privilege may be lost when actual malice is shown. *Jones v. Garner*, 250 S. C. 479, 487, 158 S. E. 2d 909; *Davis v. Niederhof*, 246 S. C. 192, 199-200, 143 S. E. 2d 367; *Rogers v. Florence Printing Company*, 233 S. C. 567, 106 S. E. 2d 258; *Bell v. Bank of Abbeville*, 208 S. C. 490, 495, 38 S. E. 2d 641. In South Carolina, actual malice can include a departure by reporters and publishers from "responsible standards of invesigation" and the reliance upon "an admittedly unreliable source, without further verification." *Stevens v. The Sun Publishing Company*, 270 S. C. 65, 72, 240 S. E. 2d 812, I am at a loss to find any competent evidence of any specific malice on the part of respondent toward the appellant. Likewise, as indicated above, I find no evidentiary basis in this record for holding that the respondent departed from responsible standards of investigation or relied upon a dubious source.

On the basis of the foregoing, I conclude that the trial judge correctly entered judgment n. o. v. for the respondent, and I would accordingly affirm.

LITTLEJOHN, A. J., concurs.

LITTLEJOHN, A. J. (concurring in dissent): I concur in the result which Chief Justice Lewis reached. To do so I need only agree with the Trial Judge who in granting the motion for judgment n. o. v. said:

> There is no evidence in the record that the reporter acted in any way other than as a reasonably prudent reporter would have acted under similar circum-

stances. The information for the story was obtained from a public official in the course of his official duties. This source had proved reliable in the past and there was no reason to doubt the accuracy of the information released by him on this occasion. The information relating to this criminal proceeding was sought and obtained in the same manner that had been routinely utilized by this reporter and other members of the news media in general practice.

I would hold that there being no fault, there is no liability.

APPENDIX B

THE SUPREME COURT OF SOUTH CAROLINA

May 31, 1982

William L. Pope, Esquire
Messrs. Robinson, McFadden,
Moore & Pope
P. O. Box 944
Columbia, South Carolina 29202

Re: James Jones v. The Sun Publishing Company, Inc.

Dear Mr. Pope:

The Court has this day refused your Petition for Rehearing in the following order:

"Petition for Rehearing is denied.

s/ J. B. Ness, A.J.
s/ George T. Gregory, Jr., A.J.
s/ David W. Harwell, A.J.

Petition for Rehearing is granted.

s/ J. Woodrow Lewis, C.J.
s/ Bruce Littlejohn, A.J.

May 31, 1982"

The remittitur is being sent down today.

Very truly yours,
s/ Frances H. Smith,
Clerk

FHS/cm
cc: George M. Hearn, Jr., Esquire

APPENDIX C

ORDER

Defendant is the parent company of the *Sun News* newspaper, published and circulated in the Myrtle Beach area of South Carolina. Under a claim that a news article which appeared in the *Sun News* on January 27, 1976, was libelous, Plaintiff recovered a jury verdict for actual damages in the amount of $35,000.00 in the Court of Common Pleas for Horry County. Post trial motions now before the Court challenge the propriety and validity of the verdict on several grounds, the most important of which is that the newspaper as a matter of law was guilty of no legal fault in publishing the news article which would justify the verdict.

The Court concluded at trial that libel actions in South Carolina are now controlled by the decision of the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 94 S. Ct. 2997. Under the clear mandate of this decision presumptions of the common law in actions for libel and slander have been ended. There must now be proof of fault under *Gertz*. Presumptions as to malice and damages no longer obtain.

There was a total absence of evidence of actual malice in this case and the Court eliminated any issue of punitive damages.

The Court submitted this case to the jury on the theory that simple negligence of the newspaper in failing reasonably to ascertain the truth and correctness of its news story would be sufficient fault to sustain a verdict if wrongful injury resulted.

Assuming that simple negligence does amount to legal fault, the Court must, in the post trial review of the case, carefully consider the actions of the newspaper to determine whether simple negligence existed.

The evidence presented at the trial is substantially uncontradicted. In the summer of 1975, the FBI was conducting an investigation along the east coast into pirated tapes of copyrighted music. In June, 1975, the FBI confiscated some 35,000 tapes at Myrtle Beach which were suspected of being "pirated" and this action was reported by the news media without mention of individual names. In November, 1975, five men were arraigned in the Federal Court in Florence on criminal charges arising out of the pirated tapes. Among these men were Myrtle Beach residents, Jack Jones, his brother, Herman Jones, and Herman's son, James Jones, the plaintiff in this case. The arraignment, together with the names of the individuals involved, was reported by the media, including the *Sun News*, with a statement by the Assistant United States Attorney that the men had been released on $25,000.00 bond each and that a tentative trial date had been set for February, 1976. No question arises about the accuracy of this particular article appearing in the *Sun News*. The *Sun News*, on January 27, 1976, reported that four Myrtle Beach men had entered guilty pleas in Federal Court to charges relating to the pirated tapes and had been fined. All of the original five, except James Jones, the son of Herman, but, including Herman Jones and Jack Jones, the brothers, had pled guilty. The news article in the newspaper was in error in reporting that Herman Jones and James Jones were among those who had pled guilty. The charges against James Jones, the son, had, in fact, been dismissed as a result of plea bargaining between the United States Attorney's Office and the individuals involved.

The reporter who wrote the article testified that he obtained the information for this story by long distance telephone from the Assistant United States Attorney in Florence. The reporter testified that this is the customary

procedure for obtaining news stories relating to criminal proceedings in the Federal Court in Florence. The Assistant United States Attorney confirmed the fact that the vast majority of news releases to the news media are made by telephone. Notes taken by the reporter during the telephone conversation were introduced in evidence and the names of Herman Calvin Jones and James Jones appear in bold handwriting. The Assistant United States Attorney testified that he recalled the specific conversation with the reporter, and while saying he gave the information from the record, did not deny confusing the names in the conversation with the reporter.

There is no evidence in the record that the reporter acted in any way other than as a reasonably prudent reporter would have acted under similar circumstances. The information for the story was obtained from a public official in the course of his official duties. This source had proved reliable in the past and there was no reason to doubt the accuracy of the information released by him on this occasion. The information relating to this criminal proceeding was sought and obtained in the same manner that had been routinely utilized by this reporter and other members of the news media in general practice.

The reporter did not personally know Jack, Herman or James Jones. The error was in using the name "James" when it should have been "Jack".

Therefore, the fault of the newspaper reporter must rest upon that momentary time span when he received the information from the District Attorney. And the simple question is: Did the reporter, having knowledge that in November, five men had been charged, upon learning that only four had pled guilty, have a duty to make an inquiry of the District Attorney about disposition of the fifth defendant? And if he had such a duty, was his failure to ask about the fifth defendant, who was James Jones,

negligence which would constitute legal fault under *Gertz*?

After long and extended reflection and repeated efforts to rationalize the case in different ways, the Court must answer each question in the negative. Such a duty to make further inquiry did not arise in this case. No duty was breached, and the failure to inquire was not negligence. There was no fault and there was, as a consequence, no libel or defamation of plaintiff.

This conclusion seems to have strong support in case law.

Under the First Amendment as interpreted in *Gertz v. Robert Welch, Inc., supra,* liability may not be imposed upon the publisher of a defamatory statement even though it be false in the absence of a showing of fault on his part.

In the later case of *Time, Inc. v. Firestone,* 424 U. S. 448, 457, 47 L. Ed. 2d 154, 96 S. Ct. 958 (1976) the Court stated:

> . . . We think *Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault.

Two quite similar cases were recently decided in Louisiana following *Gertz v. Robert Welch, Inc., supra.* In *Wilson v. Capital City Press,* 315 So. 2d 393, writ refused 320 So. 2d 203 (La. 1975), an action against the newspaper publisher for defamation stemming from an article in which the plaintiff was listed as having been arrested in a drug raid when in fact he had not been arrested, the Court said:

> Under the mandate of *Gertz v. Robert Welch, Inc.,* supra, a publisher may be held liable for defamatory falsehood only if there is some fault on his part. The Supreme Court did not hold that the printing of an

untruth would itself constitute fault. There must be some culpability on the part of the publisher.

In the *Wilson* case, *supra*, the list of persons arrested was received by the reporter from the public relations director of the police, an authorized source of information. The Court held:

> Neither Miller nor the Morning Advocate had any reason to doubt the correctness and authenticity of the information received. The source was reliable and in a proper position of authority and knowledge such that no fault can be attributed to Miller or the Morning Advocate for reliance on the information received.

In *LeBoeuf v. Times Picayune Publishing Corp.*, La., App., 327 So. 2d 430 (1976), the source of the newspaper's erroneous report of plaintiff's arrest was the information officer of the police who based his information on a routine police report. There was nothing to indicate to the newspaper's reporter that the person arrested had falsely identified himself as the plaintiff.

In considering the cause of action against the newspaper publisher, the Court, citing *Gertz v. Robert Welch, Inc.*, held:

> The uncontroverted affidavits show that this report was given to the paper pursuant to an established policy. There was no indication of irregularities in the police procedures, such reports in the past had been accurate and this particular one was routine. The reporter had never known plaintiff previously and treated this as an ordinary news item. There is nothing to suggest that the reporter or the paper was placed on guard or to suggest a finding of "fault" in the publication of the May 9, 1974, article.

Under the evidence in the instant case, it does not ap-

pear that the reporter acted other than as a reasonably prudent person would have acted under similar circumstances, or that he acted contrary to standards of care set by others in the newspaper industry. The evidence fails to make out the essential showing of fault on the part of the reporter or the newspaper.

Furthermore, criminal proceedings in the Federal Court are a matter of public interest and newspaper reporting thereon is qualifiedly privileged. *Jones v. Garner* 250 S. C. 479, 158 S. E. 2d 909, 32 A.L.R. 3d 1417 (1968). Under South Carolina common law one publishing defamatory words under a qualified privilege is only liable upon proof of express malice. See: *Fulton v. A. C.L.R. Co.*, 220 S. C. 287, 296, 67 S. E. 2d 420 (1951); Thornton v. New South Life Insurance Co., 262 S. C. 651, 653, 207 S. E. 2d 88 (1974); *Cullum v. Dun & Bradstreet, Inc.*, 228 S. C. 384, 90 S. E. 2d 370 (1955).

The showing made in the evidence fails to warrant or support a reasonable inference that the publication of the erroneous statement in the news article in the instant case was the result of simple negligence on the part of the publisher or the reporter.

A directed verdict should have been granted on the question of liability. This makes it unnecessary to discuss the motion for a new trial. The Court will say candidly, however, that a new trial would have been granted on the issue of damages. The only testimony presented on the question of damages was plaintiff's own testimony that he was embarrassed by the article. No distinction was made between the embarrassment caused by the accurate article of November, 1975, in which it was reported that he had been arraigned and the article of February, 1976, in which it was reported incorrectly that he had pled guilty. It could be said that the guilty pleas entered by his father and uncle, with whom he was in business, proved

embarrassing to him. The U. S. Supreme Court has impressed on the States that in defamation actions, plaintiffs must be limited to recovery of actual damages only in the absence of the publication of a knowing falsehood. Although embarrassment may, under proper circumstances constitute actual damage, the evidence in this case is insufficient to support the verdict and amounts to little more than mere speculation and surmise.

For the reasons contained herein, it is

ORDERED that the motion of the defendant for a judgment notwithstanding the verdict be, and the same hereby is, granted.

IT IS SO ORDERED.

s/ Wade S. Weatherford, Jr.
Circuit Judge

August 20, 1979

APPENDIX D

MOTION OF DEFENDANT FOR NEW TRIAL

The defendant, Sun Publishing Company, subject to its motion for judgment *non obstante veredicto*, moves for a new trial or in the alternative for a new trial *nisi*, upon the following grounds:

1. That the verdict was contrary to the instructions by the Court and the evidence presented at the trial.

2. That the verdict is so grossly excessive as to indicate that the jury was moved by passion or prejudice, or other considerations not founded on the evidence and the instructions of the trial court.

3. That the verdict is against the overwhelming weight of the evidence

4. That under the provisions of the First Amendment of the Constitution of the United States relating to freedom of speech and of the press the Court erred in charging the jury in connection with libel *per se* and instructing the jury that when an expression is libelous *per se*, malice is presumed or implied.

5. That the Court erred in charging the jury in connection with implied malice and instructing the jury that implied malice is a false charge consciously and intentionally or negligently made without legal justification or excuse.

6. That under the provisions of the First Amendment of the Constitution of the United States relating to freedom of speech and of the press the Court erred in charging the jury in connection with implied malice and instructing the jury that if a false charge is made, the law considers that the wrongful act carries with it an implication of intent and absence of justification.

7. That the Court erred in charging the jury that any expression which is libelous *per se* presumes or implies

malice and thereby permitted the jury to find a verdict against the defendant even if it were not in fact at fault in connection with the publication of the alleged libelous statement.

8. That the Court erred in failing to charge the jury that the plaintiff had the burden of proving by clear and convincing evidence that the publication complained of was published by the defendant with knowledge of its falsity or with reckless disregard of whether the publication was true or false.

9. That the Court erred in failing to charge the jury that it could consider whether or not for purposes of the publication complained of plaintiff was a public figure, and if a public figure for that purpose, could not recover unless it was shown by clear and convincing evidence that the defendant knew the publication was false or that it was published in reckless disregard of whether it was true or false.

10. That the Court erred in instructing the jury under the evidence in this case that in considering damages, they could consider impairment of reputation and standing in the community, there being no evidence of such damages under the circumstances in this case.

11. That the Court erred in failing to charge the jury that the plaintiff has the duty to mitigate the damages.

Respectfully submitted,
JOHN B. McCUTHEON
ROBINSON, McFADDEN,
MOORE & POPE, P.A.
By: WILLIAM L. POPE
Attorneys for Defendant

Columbia, South Carolina
15th day of February, 1978

Appendix E

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM HORRY COUNTY
HONORABLE WADE S. WEATHERFORD, JR., JUDGE
DOCKET NO. 79-612

James Jones,
Plaintiff-Appellant,

vs.

The Sun Publishing Company, Inc.,
Defendant-Respondent.

PETITION FOR REHEARING

The Petitioner, The Sun Publishing Company, Inc., respectfully petitions this Court to grant a rehearing in this case and withdraw its Opinion No. 21680, filed March 30, 1982, on the grounds that the Court misapprehended the effect of the First and Fourteenth Amendments to the United States Constitution in reference to the issue of fault on the part of the defendant and the Court overlooked respondent's alternative exception to the failure of the trial Judge to order a new trial on the grounds that the verdict was not supported by competent evidence.

I

The majority opinion misapprehended the constitutional responsibility of the appellate court in reviewing cases involving First Amendment rights in limiting its review of

the evidence and inferences therefrom to the light most favorable to the party who obtained the jury verdict. In First Amendment cases involving freedom of the press, the appellate court has a duty to reexamine the evidentiary basis of the verdict to determine if it satisfies the constitutional standard of fault with clear and convincing clarity. *Time, Inc. v. Pape*, 401 U.S. 279, 28 L. Ed.2d 45, 91 S. Ct. 633 (1971); *Buckley v. Littell*, 539 F.2d 882 (2nd Cir. 1976), *cert. den.* 429 U.S. 1062, 97 S. Ct. 786, 50 L. Ed.2d 777 (1977).

II

It is respectfully submitted that the majority opinion, in considering this case as a tort action and in seeking to rationalize the verdict of the jury; has misapprehended the decision of the U.S. Supreme Court in the case of *Gertz v. Robert Welch, Inc.*, 718 U.S. 323, 94 S. Ct. 2997, 41 L. Ed.2d 789 (1974); and has treated the issue of negligence or fault as one on which the defendant had the burden of proving freedom of fault as a defense rather than as an issue on which the plaintiff had the burden of proving negligence or fault on the defendant's part.

III

It is respectfully submitted that the majority opinion, in holding that "a jury question was presented as to whom (sic) was at fault in publishing the erroneous article," and that "there was testimony from which the jury may have fairly determined that the information was correctly conveyed to the reporter but erroneously reported by him," has overlooked or misapprehended the fact that the burden of proof on the issue of fault was upon the plaintiff; that the jury was allowed to arbitrarily fix the standard of reporting in reference to seeking information from a prosecuting officer concerning the disposition of cases handled

by him in the course of a prosecution; that the most that can realistically and properly be claimed for the plaintiff is that the matter could have happened one way as well as the other, leaving the jury with no better basis of choice than the toss of a coin; and that its verdict was necessarily based upon surmise, speculation, conjecture, and supposition. As the Court stated in *Messier v. Adicks*, 251 S.C. 268, 271, 161 S.E.2d 845 (1968):

> We therefore have a situation where the cause of plaintiff's injury may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable . . . . Under these circumstances, the general principle applies that where the cause of plaintiff's injury may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, plaintiff has failed to carry the burden of establishing that his injuries were the proximate result of defendant's negligence.

IV

It is respectfully submitted that the majority opinion has overlooked or misapprehended the application in this case of the principle that, while the fact that an injury may have occurred in one of a dozen ways would not defeat a plaintiff's right of recovery, the evidence must tend to sustain the reasonable probability of the one relied on (*Mosely v. Southern Ry. Co.*, 164 S.C. 193, 200-202, 162 S.E. 95 (1932)), and that where the evidence leaves the issue conjectural as to which way the injury occurred the party having the burden of proof is held not to have sustained that burden and cannot recover. *Crosby v. Seaboard A.L. Ry. Co.*, 81 S.C. 24, 31-32, 61 S.E. 1064, 1067 (1908); *Green v. Southern Ry. Co.*, 72 S.C. 398, 402-404, 52 S.E. 45 (1905), where the Court held:

The cause of the accident is purely conjectural. There is no more reason to suppose it was due to a defect in the machine than to an unconscious error of the plaintiff in its operation, or to some other undiscoverable cause for which neither party was responsible. 'A servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master.'"

V

It is respectfully submitted that the majority opinion, in stating that "the jury could have also inferred that Monk departed from acceptable standards of reporting when he failed to check the public record himself, rather than relying on information supplied over the telephone," has overlooked or misapprehended the fact that there is no evidence in the case as to applicable standards of reporting; except the evidence which, without contradiction, shows conclusively that the reporter followed the standards of reporting followed by others in the news gathering industry and the customary means by which out-of-town newspapers obtained information about criminal proceedings in the federal courts. The jury's determination, on the basis of its own lay and uninformed inferences, amounts to a finding of negligence merely because the report was false, amounting to a form of strict liability and thus circumventing the constitutional requirement of fault.

VI

It is respectfully submitted that the majority opinion, in dealing with the defense of qualified privilege, has overlooked or misapprehended the fact that the case does not concern the publication of the contents of a public record. On the contrary, it concerns the publication of informa-

tion about an occurrence in the course of a criminal prosecution sought from the prosecutor handling it. The occasion was undoubtedly a conditionally privileged occasion. Traditionally if the publication was defamatory and true there would have been no liability, and if the publication was defamatory and false, the defense of conditional privilege would apply unless the plaintiff proved actual malice. It is submitted that *Gertz v. Robert Welch, Inc., supra,* terminated the power of the State to impose sanction on a strict liability basis where the defendant could not prove the truth of the statement, but did not terminate the existing conditional privilege defense as stated above. It is also submitted that the principle of conditional privilege applied to the publication in question even if erroneous because it came within the public policy served by the principle of conditional privilege and there is no evidence of actual malice as defined in the South Carolina authorities.

VII

The majority opinion misapprehended the United States Supreme Court case of *Time, Inc., v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed.2d 154 (1976). In the *Firestone* case the Supreme Court considered whether an inaccurate report of a judicial decision was the result of fault on the part of the reporter, whereas, in the instant case the article is based on a statement by the U.S. Attorney as to an occurrence in the course of the handling of a prosecution by him. In determining fault, the majority opinion overlooks the fact that fault must be determined in connection with the reporting of information furnished by the United States Attorney and not in connection with the contents or an interpretation of a court record.

VIII

It is respectfully submitted that the majority opinion,

in stating that the U.S. Attorney "testified that he read the names *directly* from the public records" (emphasis added), has overlooked the fact that his testimony was merely that he "read from the record, the public record, to Mr. Monk;" that "so far as I know, I told him what was on the record, and that was my intent;" that as to whether he made a mistake he said "I don't know;" that he did not say what names he read from the record; and that he disclaimed the reliability of the information which he gave. Any conclusion by the jury that the U.S. Attorney read the correct name directly from the record is based on speculation and surmise.

IX

The Court apparently overlooked and did not pass on defendant's exceptions to the failure of the trial court to grant a new trial on the basis of his finding that ". . . the evidence in this case is insufficient to support the verdict . . ." (T. 155). Under the U.S. Supreme Court case of *Gertz v. Robert Welch, Inc., supra,* presumed damages are not permissible and all awards of damages must be supported by competent evidence concerning the injury. The trial court found that as a fact the evidence concerning the injury did not support the award of damages, and the defendant was entitled to the granting of a new trial in the alternative.

SUMMARY

By reason of the points overlooked or misapprehended as herein discussed, Petitioner respectfully submits that its Petition for Rehearing should be granted and the Court should vacate its Opinion and affirm the judgment n.o.v.

of the lower court, or in the alternative, remand the case for a new trial.

Respectfully submitted,
McCUTCHEON, McCUTCHEON & BAXTER
ROBINSON, McFADDEN, MOORE & POPE, P.A.

By William L. Pope
Post Office Box 944
Columbia, SC 29202
Attorneys for Defendant-Respondent

Columbia, South Carolina
8th day of April, 1982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

THE SUN PUBLISHING COMPANY, INC., Petitioner,

versus

JAMES JONES, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of August, 1982, three copies of the Petition for Writ of Certiorari were mailed by certified mail, postage prepaid, to J. Jackson Thomas, Counsel of Record for Respondent, addressed to 3995 Walnut Street, Loris, South Carolina, 29569. I hereby certify that all parties required to be served have been served.

WILLIAM L. POPE
P. O. Box 944
Columbia, SC 29202
Counsel of Record for Petitioner

ROBERT McC. FIGG
P.O. Box 944
Columbia, SC 29202
Counsel for Petitioner

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 82-338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE SUN PUBLISHING COMPANY, INC.
Petitioner,

versus

JAMES JONES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES P. STEVENS
Post Office Box 627
Loris, SC 29569
(803) 756-7652
Counsel for Respondent

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STATEMENT OF THE CASE

Respondent, James Jones, commenced this action for libel against Petitioner, The Sun Publishing Company, Inc., to recover for an article published in the Myrtle Beach *Sun News* newspaper which erroneously stated he had pled guilty to violation of federal copyright laws. In February, 1978, a jury returned a verdict in favor of Respondent for $35,000.00 actual damages. (R. 113) By Order dated August 20, 1979, the trial judge granted Petitioner's Motion for judgment *non obstante veredicto*. On March 30, 1982, the Supreme Court of South Carolina reversed the order of the trial judge and reinstated the jury verdict.

The offending article, published January 27, 1976, concerned four Myrtle Beach area men who had pled guilty to charges of violating federal copyright laws in a stereo tape "pirating" scheme. While Respondent Jones was one of five men originally arraigned on the pirating charges, the charges against him were dismissed. The January 27, 1976, Sun News article, however, stated Respondent was fined $1,000.00 by a federal judge following a purported guilty plea.

The Sun News reporter who authored the article in question, John Monk, testified he received the information relative to the guilty pleas in a telephone conversation with the Assistant United States Attorney. (R. 125) The Assistant United States Attorney testified the charges were in fact dismissed against Respondent (R. 84), and that he read to Monk the names of those pleading guilty directly from the file. (R. 76)

The reporter, Monk, also testified that although he was aware of the potential for confusion in the names of those individuals connected with the piracy charges, he never attempted to verify the facts relayed to him by the Assistant United States Attorney, either by looking at the public records himself or contacting any of the individuals involved. (R. 48, 56)

In his Complaint, Respondent asserted the Petitioner published a false and defamatory article which resulted in substantial damage to his reputation. (R. 2) Petitioner admitted the publication of the article but alleged that because the article concerned a matter of public interest, it was priviledged under the United States and South Carolina Constitutions. (R. 5)

REASONS FOR DENIAL OF THE WRIT

THE JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA IN THIS LIBEL ACTION CORRECTLY REINSTATED THE JURY VERDICT WHICH WAS BASED ON A FINDING OF FAULT BY THE PETITIONER IN ITS PUBLICATION OF AN ADMITTEDLY ERRONEOUS ARTICLE.

(1)

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), this Court declined to extend the principles spawned in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), to private individuals who become embroiled in a public issue. The *Gertz* Court outlined the parameters of state defamation law as follows:

> We hold that so long as they do not impose liability without fault, the States may define for themselves the appropriate standard for a publisher or broadcaster of defamatory falsehood injurious to a private individual. 418 U.S. at 346, 94 S. Ct. at 3010.

Accordingly, since the Respondent Jones was a private individual, it was only incumbent upon him to establish some degree of fault by the publisher in order to warrant a jury verdict in his behalf.

In *Time, Inc. v. Firestone*, 424 U.S. 407, 96 S. Ct. 958 (1976), this Court noted the vigorous standard to be applied to publishers who undertake to print the contents of public records:

> Petitioner (Time, Inc.) may well argue that the meaning of the trial court's decree was unclear, but this does not license it to choose from among several conceivable interpretations the one most damaging to respondent. Having chose to follow this tack, petitioner must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct. 424 U.S. at 459, 96 S. Ct. at 967-68.

Thus, under the principles of *Gertz, supra*, and *Firestone, supra*, the jury could constitutionally have determined that the publisher was at fault for printing the inaccurate article.

(2)

Petitioner's argument that the decision of the South Carolina Supreme Court to re-instate the jury verdict is tantamount to imposition of liability without fault is erroneous. Ample evidence of negligence or fault on the part of the publisher existed to satisfy the standard articulated in *Gertz, supra.*

The Assistant United States Attorney's testimony that he read the names of those individuals pleading guilty directly from the record gives rise to the clear inference that the reporter, Monk, copied down the names erroneously. Moreover, the jury might well have concluded that Monk was negligent in failing to verify the information given him over the telephone, particularly when he knew or should have known the story would have a devastating impact on the reputation of the men pleading guilty. Indeed, Monk testified he was aware of the potential for confusion in the names of the men arraigned yet he proceeded to publish a story which was not "hot news" without further verification. (R. 56-57)

(3)

Respondent respectfully submits that the standard of *Gertz, supra,* was satisfied in this case. The jury apparently concluded that the mistake in the name of one of the individuals allegedly pleading guilty was occasioned by the fault of the publisher. The following language contained in the South Carolina Supreme Court Opinion indicates the court was acutely aware of the standard established by *Gertz, supra:*

> Here, there was no claim or proof that appellant Jones was either a public official or a public figure; hence, under the reasoning of *Gertz v. Robert Welch, Inc.*, 718 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), appellant was required only to establish some measure of legal fault by the publisher in order to warrant submission of the matter to the jury.

II

PETITIONER'S ARGUMENT THAT THE JURY VERDICT WAS INVALID BECAUSE OF THE ALLEGED IMPROPER JURY INSTRUCTIONS MUST FAIL BECAUSE PETITIONER

FAILED TO PRESERVE THIS ISSUE BY RAISING IT BEFORE THE SUPREME COURT OF SOUTH CAROLINA, AND NEVER INCLUDED THE TRIAL JUDGE'S INSTRUCTIONS IN THE RECORD FOR REVIEW.

Petitioner's second argument attempts to raise an issue that has not been preserved for review. The trials judge's instructions to the jury were not included in the transcript of record before the Supreme Court of South Carolina; nor was this issue briefed by Petitioner before that Court. The Supreme Court of South Carolina thus never was afforded the opportunity to consider this issue, and Petitioner should be barred from raising it at this late date.

CONCLUSION

It is respectfully submitted that Petitioner's Petition for Writ of Certiorari is without merit; that the Supreme Court of South Carolina properly re-instated a jury verdict that was founded on ample proof of fault; and that the issue of the trial judge's allegedly deficient charge was not raised before the Supreme Court of South Carolina and, therefore, not properly preserved before this Court.

For the reasons hereinabove set forth, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JAMES P. STEVENS
Post Office Box 627
Loris, SC 29569
Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-338

THE SUN PUBLISHING COMPANY, INC., Petitioner

versus

JAMES JONES, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 1982, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed by certified mail, postage prepaid, to William L. Pope, Counsel of Record for Petitioner, addressed to Post Office Box 944, Columbia, South Carolina 29202. I hereby certify that all parties required to be served have been served.

s/ **JAMES P. STEVENS**
Post Office Box 627
Loris, SC 29569
Counsel for Respondent